IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. —.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, *Petitioner,*

vs.

JANE SAXE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported but is included in the record herein (R. 188-210).

II

JURISDICTION.

The grounds upon which the jurisdiction of this Court is invoked are stated in the foregoing petition (p. 6).

III.

STATEMENT OF THE CASE.

The case has been briefly stated in the foregoing petition, which is hereby referred to and adopted as a part of this brief.

IV.

SPECIFICATION OF ERRORS.

1. The Court of Appeals erred in holding that there was an issue between the parties as to whether the Beth Isreal Hospital record was genuine or fictitious and that there was legally sufficient evidence to establish that it was fictitious.

2. The Court of Appeals erred in holding that under the statute it was necessary for petitioner to show the concealment of the Beth Israel Hospital record was intentional on the part of insured.

3. The Court of Appeals erred in holding that all the statute requires of an applicant for insurance is bona fide answers to inquiries concerning sojourns in hospitals and consultation with or attendance by physicians.

4. The Court of Appeals erred in holding that under the statute it was necessary for the insurer to show that the insured had the disease for which he was hospitalized and that it was the cause of death or existed when death occurred before it can avoid a policy because of misstatements in the application.

5. The Court of Appeals erred in holding that there was sufficient disclosure concerning the hospital record to establish waiver as a matter of law.

6. The Court of Appeals erred in holding that an agent of the insurer could receive representations and information in this case so as to bind the insurer contrary to a provision in the policy.

7. The Court of Appeals erred in holding that the claims to the proceeds of the policy were not compulsory counterclaims under the Federal Rules of Civil Procedure.

8. The Court of Appeals erred in holding that Petitioner was not entitled to a directed verdict in the trial court.

V.

SUMMARY OF ARGUMENT.

Jane Saxe was permitted to testify concerning a conversation with her husband, out of the presence of Petitioner, in which he told her that he had been in Beth Israel Hospital in Boston, not because he was ill but because he had too much to drink and that Dr. Fine agreed to falsify the record to make it look like he was sick. This testimony was admitted by the trial court to let the jury understand the background of an alleged waiver by Petitioner but it is taken by the Court of Appeals as evidence sufficient to establish the actual falsity of the hospital record. This results in Petitioner being dealt with unfairly and in denying to it the opportunity of producing testimony from Dr. Fine, and others, to show that the records of the hospital were true, and which it would have done had this testimony been admitted for this purpose at the trial.

The court also misconstrues a statute so as to require the insurer to prove the mental process of an applicant when he does not disclose hospitalization and treatment by doctors, and also to show that the cause of the hospitalization was the cause of death, or existed at the time of death, when all the statute actually requires is proof that the false statement was made either with intent to deceive or that it materially affected either the acceptance of the risk or the hazard assumed.

Furthermore, the ruling of the court that a representation to the insurer that the insured had been hospitalized because of a "social lapse" resulting from too much liquor is sufficient to support a waiver, as a matter of law, of the fact that the hospital record actually showed hospitalization for a duodenal ulcer, is contrary to the decisions of this Court that there must be a full disclosure in order to support a waiver.

The ruling of the court that a policy provision restricting the right of an agent to receive representations and information is ineffectual is also contrary to previous decisions of this Court.

In holding that a claim to the proceeds of a policy is not a compulsory counterclaim in a prior suit instituted for the purpose of cancelling the same policy, the court has misconstrued Rule 13(a) of the Federal Rules of Civil Procedure and construed the rule contrary to other Federal decisions.

ARGUMENT.

A.

Testimony Admitted By the Trial Court For One Purpose Cannot Be Used By An Appellate Court As Legally Sufficient Evidence For Another Purpose.

After devoting 8 pages to some of the facts the Appellate Court reaches the conclusion that

> "* * * the evidence is not only squarely in conflict, but substantially so, as to whether the Beth Israel hospitalization was genuine or fictitious. This affects nearly every issue in the case." (R. 195.)

There was no such issue before the case got to the Court of Appeals. The pre-trial order shows that the issues were materiality of the misrepresentation and waiver (R. 24) and the charge of the trial justice refers only to these issues (R. 109, 141 et seq). Dr. Fine, who was personally cross-examined by counsel, was asked nothing concerning the

supposed truth or falsity of the hospital record (R. 50). Yet he was the one who was supposed to have seen that the record was falsified (R. 104).

There was no legally sufficient evidence to establish the fictitious character of the Beth Israel Hospital records. The claimants admitted that the insured had spent from January 16, to January 30, 1934, in Beth Israel Hospital and had been treated therein by Dr. Fine (R. 22, 23), but neither offered any testimony as to the reason for the stay in the hospital and the treatment by Dr. Fine. The only evidence in the entire record with respect to this phase of the case is found in the testimony of Dr. Fine (R. 44) and in the hospital record (R. 155-183).

Jane Saxe, the wife, was permitted to testify to a conversation which she had with her husband when he went into a hospital for his last illness, in which he said that he had too much to drink on one occasion when he was building a house for Dr. Fine and went to the hospital (R. 101), that he wasn't actually ill but did not want to break his class record at Columbia University, so Dr. Fine agreed to fix up something in the hospital record so it would appear that he was ill (R. 104). This conversation, allegedly repeated to Brine, the local superintendent of the insurance company, was admitted by the trial court solely for the purpose of explaining to the jury the background of the alleged waiver (R. 82, 83, 85, 99, 101, 103, 109, 122, 127, 128), and none of it was admitted as binding on the insurance company (R. 101, 127). Brine denied that he was given this information with respect to Beth Israel Hospital (R. 113-117).

Nevertheless, the Court of Appeals has taken this testimony as the basis for its decision that

> "* * * this was not a genuine hospitalization, but was really a fictitious one for two purposes, to cover up an alleged 'social lapse' of the insured caused by overdrinking at a wedding party and thereby explain or

excuse his absence from his classes, and at the same time to complete the work he was doing as an architect for Dr. Fine on a house he was then building in Boston." (R. 192.)

That this testimony was considered by the Court of Appeals as creating an issue on, and legally sufficient to establish the fictitiousness of, the hospital record is shown by many other statements in the opinion:

"The medical evidence sustaining appellee's version of the Boston incident * * *". (R. 194.)

"He (Dr. Fine) was interested, in the sense that appellee's version of the Beth Israel episode, if true, called in question his professional ethics." (R. 194.)

"* * * appellee's version of the nature and purpose of the insured's admission and stay at Beth Israel takes on a verity it would not have if the hospital records and the medical testimony more strongly supported the insurer's version. Taking account of all the evidence in her behalf, we cannot regard it as inherently incredible, and for that reason improper for submission to the jury." (R. 194.)

"On the other (side) is a theory at most of recuperation from overindulgence in alcohol, without other than temporary if perhaps somewhat abnormal effects; or, of even less importance for insurance, of purely fictitious hospitalization for the sole purpose of supplying an apparently genuine, but actually false medical record of illneses * * *". (R. 194.)

"* * * on the evidence presented the falsity of all the answers was a question of fact and the jury has resolved this issue in each instance, on legally sufficient evidence, against it. This would be on the broad basis that the verdict has determined, in accordance with appellee's contention and the evidence supporting it, that the entire matter, including the records, of the Beth Israel hospitalization was fictitious, not genuine; * * *". (R. 197.)

"* * * if the jury believed that the Beth Israel hospitalization was wholly fictitious, including the hospital

records, it could find these answers were not false in fact.

* * * * *

These statements are not necessarily inconsistent, if it is believed he went to Beth Israel, as he said, not because he was really ill, but to cover up his 'social lapse'.

* * * * *

These things * * * made a substantial case for the jury that the misstatements were not made with intent to deceive, as against the evidence for the insurer * * *". (R. 200.)

"It assumes the insured, had he mentioned Beth Israel, would have done no more, that is, would not have disclosed the 'drinking episode' version of the incident.

* * * * *

* * * Prudential assumes * * * that the hospitalization was genuine, the records were genuine and correct. * * * These assumptions, so far as they have not been proved false, are highly speculative * * *". (R. 201.)

"The difficulty with this now is that the jury has found the Beth Israel episode was just what the insured said it was." (R. 202.)

The result of the decision of the Court of Appeals is that Petitioner is deprived of the right to meet the issue of alleged falsity of the hospital record. If that issue had been presented at the trial or if the testimony had been admitted on the frank issue of falsity of the record, it could have been met by testimony from Dr. Fine, the other doctors and nurses who participated in making the record, and from other sources.

For the Court of Appeals to take this hearsay testimony, admitted for a limited purpose and on an avowed issue of waiver, and hold it to be legally sufficient evidence to sustain a concealed issue of genuineness of the hospital record is such a distinct and harmful departure from the usual course of judicial procedure as to call for the supervisory power of this Court.

"A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected."

Shepard v. *United States,* 290 U. S. 96, 103.

B.

The Decision of the Court of Appeals Misconstrues the Statute.

The statute, which is set forth verbatim in the petition (p. 7) provides that recovery under a policy shall not be denied because of the falsity of a statement in the application unless it be proved that the statement was made (1) with intent to deceive *or* (2) unless it materially affected (a) the acceptance of the risk *or* (b) the hazard assumed by the company.

The trial court refused to receive testimony as to what Petitioner would have done had the hospital record been disclosed (R. 53) but it was proved as a general practice of insurance companies that if a history of hospitalization had been disclosed in the application the hospital records would have been examined, and if there was a diagnosis, or even a suspected diagnosis, of duodenal ulcer within three or five years the application would have been rejected without further inquiry (R. 69).

The Court of Appeals holds that "all the statute requires is that answers be made bona fide" (R. 201) and while "there were therefore misstatements of fact" and the insured "must have known he had been at Beth Israel Hospital" (R. 200) there was no showing that the insured "knowingly or intentionally spoke falsely" and therefore "the statements were not false, as a matter of law, except merely in the sense of being contrary to fact" (R. 201).

The Court does not recognize a difference between a question as to whether the applicant is afflicted with certain diseases, as to which good faith answers are all that can be required (*Moulor* v. *American Life Insurance Co.,* 111 U. S. 335) and a question whether the applicant has con-

sulted a physician or been in a hospital, matters of fact which are known to him and in which there is no room for opinion (*New York Life* v. *McCarthy* (C. C. A. 5th) 22 F. (2d) 241, *New York Life* v. *Hunter* (C. C. A. 8th) 32 F. (2d) 173, *Prudential Insurance Co.* v. *Loewenstein* (C. C. A. 4th) 76 F. (2d) 479).

There never can be a showing of the mental processes of an insured and for this reason the Federal courts have unanimously held that concealment of matters which must be known, such as sojourns in hospitals and medical attendance, are of themselves sufficient to establish the necessary intent. Among many such cases are: *Mutual Life* v. *Hilton-Green,* 241 U. S. 613, *Kavakos* v. *Equitable Life,* 66 App. D. C. 380, 88 F. (2d) 762; *Kaplan* v. *Manhattan Life,* 71 App. D. C. 250, 109 F. (2d) 463; *Columbia National Ins. Co.* v. *Rodgers,* (C. C. A. 10th) 93 F. (2d) 740; *Mutual Life* v. *Hurni Packing Co.,* (C. C. A. 8th) 260 Fed. 641; *Aetna Life Ins. Co.* v. *Perron,* (C. C. A. 7th) 69 F. (2d) 401; *Lawrence* v. *Connecticut Mutual Life,* (C. C. A. 6th) 91 F. (2d) 381; *Home Life Ins. Co.* v. *Madere,* (C. C. A. 5th) 101 F. (2d) 292; *Prudential Insurance Co.* v. *Loewenstein,* (C. C. A. 4th) 76 F. (2d) 479; *Raives* v. *Raives,* (C. C. A. 2d) 54 F. (2d) 267.

The Court of Appeals' construction of the statute is contrary to the construction placed upon similar statutes by other Federal courts, which have held that facts such as are presented in this case are sufficient under the statute to bar the right of recovery under the policy (*New York Life* v. *McCarthy* (C. C. A. 5th) 22 F. (2d) 241, *New York Life* v. *Simons* (C. C. A. 1st) 60 F. (2d) 30, *Fountain & Herrington* v. *Mutual Life,* (C. C. A. 4th) 55 F. (2d) 120, *New York Life* v. *Drooker* (D. C. Mass.) 53 F. (2d) 859, *Palmquist* v. *Standard Insurance Co.* (D. C. Cal.) 3 F. Supp. 356, *Equitable Life* v. *Carver* (D. C. Wash.) 17 F. Supp. 23).

Even where the statute requires that the misstatement in the application be shown to be willfully false and fraudulent, as well as material, the courts have held that there

could be no recovery in a case such as this (*New York Life* v. *Wertheimer* (D. C. Ohio) 272 F. 730, *New York Life* v. *Goerlich* (C. C. A. 6th) 11 F. (2d) 838, *Lyttle* v. *Pacific Mutual Life* (C. C. A. 6th) 72 F. (2d) 140; and the same is true where the statute requires that the misrepresentation contribute to the loss (*Hesselberg* v. *Aetna Life* (C. C. A. 8th) 75 F. (2d) 490, *Columbia National Life* v. *Rodgers* (C. C. A. 10th) 93 F. (2d) 740).

As this statute is construed by the Court of Appeals, no effect is given to the provision thereof which bars recovery if a false statement materially affects the acceptance of the risk. If effect is given to that provision, then the uncontradicted evidence in the case is that the application would have been declined had the hospital record been disclosed, and the concealment thereof being a material misrepresentation as a matter of law, the trial court should have directed a verdict for the company, and the Court of Appeals should have held there was no liability on the insurer.

The dissenting opinion recognizes the true situation and holds:

> "Case No. 7824 should, in my opinion, be reversed for failure of the trial court to direct a verdict for the appellant: In view of the insured's Beth Israel Hospital experience, and his medical history as disclosed in the Hospital records, I think the insured's negative answers to question 6d, 7a, 9a and 10a and his affirmative answer to question 10b of the insurance application constituted misstatements which all reasonable jurymen must have found materially affected the acceptance of the risk; * * *" (R. 210.)

C.

The Effect of the Opinion of the Court of Appeals is That, Under the Statute, it is Necessary to Establish that the Insured Had Disease For Which He Was in the Hospital and that it was the Cause of Death or Existed When Death Occurred.

The principal contention of Petitioner was that the insured, in concealing his hospital record had committed a fraud and misrepresented a matter which was material to the acceptance of the risk. It is not necessary, under the statute, to do more.

The Court of Appeals now holds that:

> "A misstatement to be material to the hazard assumed must be shown in some way to have affected it or contributed to the loss, and in a substantial manner." (R. 201)

In order to bring this case within that ruling the Court of Appeals misstates Petitioner's contention to be that there was a real hospitalization with a diagnosis of duodenal ulcer and that "it was the cause of death or existed when death occurred" (R. 195) but that "the insurer did not prove, to the jury's satisfaction, that the insured ever had duodenal ulcer" (R. 198).

There is no requirement in the statute that the misstatement contribute to the loss in any way. That is the statute law of the State of Missouri (Sec. 5843 R. S., 1939). Apparently the Court of Appeals was trying to read the law of Missouri into the statute law of the District of Columbia, as shown by the reference made by it to Missouri cases (R. 196, 197), none of which were cited to it in any brief. But even under the Missouri statute the Federal courts hold that matters such as are involved here are material as a matter of law and the policy is voidable even though the untrue answer was made in good faith, *Hesselberg* v. *Aetna Life Ins. Co.*, (C. C. A. 8th) 75 F. (2d) 490.

If such is to be the law of the District of Columbia, it should be enacted by the Congress, not by the Court of Appeals.

D.

The Court of Appeals' Opinion is Contrary to the Decisions of This Court with Respect to Waiver and the Contract Provision Limiting the Authority of An Agent.

The opinion holds that the statement made by Jane Saxe to a representative of the insurer, that the insured had been in the hospital for a 'social lapse' but was not ill, was sufficient to support a waiver, as a matter of law, of the fact that the hospital record actually showed he was in the hospital for two weeks with a suspected diagnosis of bleeding duodenal ulcer and a final diagnosis of duodenal ulcer (R. 203).

The dissenting opinion properly holds that:

> "* * * the alleged waiver of appellant's right to avoid the policy because of misstatements in the application was as a matter of law ineffective for the reason that undisputedly the material facts concerning insured's Beth Israel Hospital experience and medical history as shown by the Hospital records were not fully disclosed to the appellant at the time of the alleged waiver. Waiver is an intentional relinquishment of a right and therefore requires knowledge of the existence of the right or of the facts upon which the same depends." (R 210.)

In holding as it does, the majority opinion casts aside the legal principles established by this Court in the cases of *Bennecke* v. *Connecticut Mutual Life Ins. Co.*, 105 U. S. 355, and *Globe Life Insurance Co.* v. *Wolff*, 95 U. S. 326, on the sole ground that the fact sought to be waived in those cases was the death of the insured (R. 203). The principle of law established in these cases is still the law and has been followed not only by this Court but by other Federal courts.

The policy contained the following provision:

> "Modification, etc.— * * * No Agent has power * * * to waive any forfeiture, or to bind the Company by making any promise, or by making or receiving any representations or information." (R. 152.)

The Court of Appeals holds that this policy provision is ineffectual, and condemns it on the authority of one Mississippi case (R. 204) notwithstanding this Court has held such provisions valid and binding in many cases: *Prudential Life* v. *Moore,* 231 U. S. 543, *New York Life* v. *Fletcher,* 117 U. S. 519, *Northern Assurance Company* v. *Building Association,* 183 U. S. 308, *Penman* v. *Fire Insurance Co.,* 216 U. S. 311, *Lumber Underwriters* v. *Rife,* 237 U. S. 605, *Mutual Life* v. *Hilton-Green,* 241 U. S. 613, *Sun Insurance Co.* v. *Scott,* 284 U. S. 177.

E.

The Court of Appeals Misconstrues Rule 13(a), Federal Rules of Civil Procedure.

This rule is as follows:

> "Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *".

The Court of Appeals says that to apply the rule to this case forces a surrender of a trial by jury by the claimants to the fund (R. 208). It also says that the rule does not apply to this case because "at the time of the filing of the pleading, namely, the counterclaim, the claim it stated *was* 'the subject of a pending action', namely, appellee's suit" (R. 208). In other words, it holds the claimant having filed a separate suit before she filed her counterclaim, the rule does not apply to her when she comes to answer the prior

suit filed by the insurer. This ignores the fact that there was an even earlier suit involving the same transaction and filed by the insurer.

Such an interpretation does not carry out the intent of the Federal Rules of Civil Procedure and is contrary to the judgments of other Federal courts with respect to similar subject matter:

Union Central Life v. *Burger* (D. C. N. Y. 1939) 27 F. Supp. 554,
Judson v. *Buckley* (D. C. N. Y. 1940) 31 F. Supp. 246,
New England Mutual Life v. *Barnet* (D. C. Ala. 1941) 39 F. Supp. 761,
Pennsylvania Railroad Co. v. *Musante-Phillips* (D. C. Cal. 1941) 42 F. Supp. 340,
Williams v. *Robinson* (D. C. D. C. 1940) 1 F. R. D. 211,
Hancock Oil Co. v. *Universal Oil Products* (C. C. A. 9th 1940) 115 F. (2d) 45,
Beauknit Mills v. *Eday Fabric Sales Corp.* (C. C. A. 2d, 1942) 124 F. (2d) 563,
John R. Alley Co. v. *Federal National Bank,* (C C. A. 10th 1942) 124 F. (2d) 995,
Holtzoff, New Federal Rules, pp. 44, 110,
Federal Rules Institutes:
New York Proceedings, p. 275,
Washington Proceedings, p. 58,
Cleveland Proceedings, p. 247.

CONCLUSION.

The Court of Appeals seems to have entirely overlooked the fact that the insured, by falsely stating that he had never been in a hospital, deprived Petitioner of a very material part of the information which was necessary to enable it to determine whether or not it would enter into the proposed contract and wrongfully withheld from it the means of making an investigation to that end. To say, as the court does, that no harm resulted from the concealment, because had the insured disclosed the hospital record he would have disclosed also a version of it which the

claimants made no attempt to establish legally at the trial, ignores the fact that he thereby obtained a valuable contract which is now being enforced.

> "This is bad morality and bad law. No one may do evil that good may come. No man is justified in the utterance of a falsehood."
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> *Jeffries* v. *Insurance Company,* 22 Wall. 47, 52.

For the Appellate Court to support the advantage so gained, by holding that testimony admitted for a limited purpose is sufficient and competent to establish a different issue, and by ignoring long established legal principles, is to assist in depriving Petitioner of the right to determine for itself whether it would accept the proffered risk in the light of the true facts.

The judgment should, therefore, be reviewed by this Court.

Respectfully submitted:

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